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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

IN RE GRAND JURY PROCEEDINGS:

DONALD FERGUSON,
JOSEPH FERGUSON,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JOSEPH FERGUSON

QUESTIONS PRESENTED FOR REVIEW

I

Whether the civil contempt Order should be set aside when there is no longer any valid proceeding at which the Petitioners can be compelled to testify in that the Statute of Limitations for the offense under investigation has expired.

II

Whether the civil contempt Order should be vacated in that the testimony of the Petitioners is no longer "necessary to the public interest" and any further confinement would exceed the life of "the Court proceedings."

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1983

IN RE GRAND JURY PROCEEDINGS:

DONALD FERGUSON,
JOSEPH FERGUSON,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Peitioners, Donald Ferguson and
Joseph Ferguson, respectfully pray that a
Writ of Certiorari issue to review the
judgment of the United States Court of
Appeals for the Ninth Circuit entered on
December 5, 1983.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its Memorandum Opinion affirming the District Court Orders adjudging the Petitioners Donald and Joseph Ferguson in civil contempt on December 5, 1983. The Memorandum Opinion was deemed "Not For Publication." A copy of the Memorandum is attached as Appendix "A". On February 10, 1984, an Order was entered denying a Petition for Rehearing and Suggestion for Rehearing en banc. A copy of the Order is attached as Appendix "B".

JURISDICTIONAL GROUNDS

On December 5, 1983, the United States Court of Appeals for the Ninth Circuit entered a Memorandum Opinion affirming the Order of the United States District Court for the Southern District of California adjudging Petitioners

Donald and Joseph Ferguson in civil contempt. A Petition for Rehearing and Suggestion for Rehearing en banc was denied on February 10, 1984.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States

Constitution:

No person ... shall be compelled in any criminal case to be a witness against himself ...

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §3282:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Title 18 U.S.C. §6003:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a Court of the United States or a Grand Jury

of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistance Attorney General request an order under subsection (a) of this section when in his judgment --

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

I

On October 26, 1978, a robbery was committed aboard the U.S.S. Dixon, a submarine tender, which was then berthed at the Navy submarine base in San Diego, California, and approximately one hundred ninety thousand (\$190,000.00) in currency was stolen by two or three individuals. Sometime later, a federal grand jury was convened in the Southern District of California to commence investigation of the robbery.

Petitioners Donald and Joseph Ferguson were subpoenaed by the United States Attorney for the Southern District of California to testify before this grand jury. Counsel for Petitioners were informed that Donald and Joseph Ferguson were targets of the federal grand jury investigation into the robbery of the U.S.S. Dixon.

On October 12, 1983, the Honorable Gordon Thompson, Jr., United States District Court Judge, entered Orders compelling testimony with regard to the Petitioners. These Orders were issued pursuant to 18 U.S.C. §6002 and only became effective once the Petitioners refused to testify on the basis of their Fifth Amendment privilege against self-incrimination.

On October 24, 1983, Petitioners appeared before the United States District Court and, after having raised certain objections to providing testimony before the grand jury for the Southern District of California, were ordered by the District Court to return the next day and provide testimony. On the following day, October 25, 1983, Petitioners appeared before the grand jury for the Southern District of California and

maintained their objections to testifying based upon their Fifth Amendment privilege against self-incrimination and, also, alleged improper abuse of the grand jury.

On that same day, Petitioners appeared before the United States District Court after refusing to testify before the grand jury and were held in civil contempt pursuant to Title 28 U.S.C. §1826(a) and were committed to the custody of the attorney general until they purged their contempt by testifying or until the expiration of the grand jury.

At midnight on October 26, 1983, the five (5) year Statute of Limitations with regard to the robbery of the U.S.S. Dixon expired. Title 18 U.S.C. §3282. On October 27, 1983, Petitioners filed a Motion before the United States District

Court moving to set aside the civil contempt Order based on the expiration of the Statute of Limitations with regard to the offense under investigation. On October 28, 1983, Petitioners appeared before the District Court, a hearing was conducted, and said Motions were denied. Both Petitioners were then released on bond pending exhaustion of their appellate remedies.

II

On December 5, 1983, the United States Court of Appeals for the Ninth Circuit affirmed the Order entered by the United States District Court adjudging Petitioners in civil contempt. The Court's Opinion was in memorandum form and consisted of one sentence, without analysis or legal citation. (See Appendix "A").

On February 10, 1984, the Ninth Circuit Court of Appeals denied Petitioners' Petition for Rehearing and Suggestion for Rehearing en banc. (See Appendix "B").

REASONS FOR GRANTING THE WRIT

I

The Failure of the Ninth Circuit to Set Aside Petitioners' Civil Contempt Orders, Entered By the District Court After Their Refusal to Testify Before a United States Grand Jury Which Was Investigating an Offense for Which the Statute of Limitations Had Terminated, is Unprecedented and Erroneously Expands the Function and Investigative Powers of Federal Grand Juries Thereby Requiring the Exercise of This Court's Supervisory Powers.

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The purpose of a Grand Jury inquiry is to obtain information about criminal activities in order to determine whether to return an Indictment and launch a criminal proceeding. United States v. Halderman, 559 F.2d 31, 95 (D.C. Cir. 1976), cert.den., sub nom., Ehrlichman v. United States and Mitchell v. United States, 431 U.S. 933, 97 S.Ct. 2641 (1977). Indeed, the investigative function of the Grand Jury is carried out with the specific purpose of determining whether probable cause exists to institute criminal prosecutions. Boron v. United States, 449 F.2d 933, 939 (9th Cir. 1971).

In order to facilitate this investigative function, the Grand Jury has the power to summon all the information it deems necessary to fulfill its investigatory obligation and such

power is limited only to the reasonable specificity that fundamental due process requires. In Re Grand Jury Proceedings, 73 F.R.D. 647, 651 (M.D. Fla. 1977), and cases cited therein. The summoning of witnesses to attend and give testimony before the Grand Jury is by far the most common investigative tool utilized. Absent the claim of privilege, it is the duty of every citizen to appear and give evidence before the Grand Jury. United States v. Dionisio, 410 U.S. 1, 9, 93 S.Ct. 764, 769 (1973). A witness called before a Grand Jury may be held in contempt if he refuses "without just cause" to testify. 28 U.S.C. Section 1826; In Re Grand Jury Proceedings, 662 F.2d 532, 533 (9th Cir. 1981). Such a situation arises when a witness refuses to testify before a Grand Jury after having been granted use immunity pursuant

to 18 U.S.C. Section 6002. If, after having been granted immunity, the witness still refuses to testify, a District Court, under the authority of 28 U.S.C. Section 1826(a), can hold the witness in civil contempt and order his confinement "until such time as the witness is willing to give such testimony or provide such information".

Civil contempt, as opposed to criminal contempt, is a remedial sanction used to obtain compliance with a Court Order or to compensate for damage sustained as a result of noncompliance. Criminal contempt, on the other hand, is to punish intentional misconduct, and the procedural safeguards that attend any criminal proceeding come into play. United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980); see also Shillitani v. United States, 384 U.S. 364, 86 S.Ct.

1531 (1966); McComb v. Jacksonville Paper Co., 335 U.S. 187, 69 S.Ct. 497 (1949). Being remedial, a party always has the ability to purge a civil contempt by simply complying with the Court's orders. Shillitani v. United States, supra, 382 at 370-371, 86 S.Ct. at 1535; In Re Stewart, 571 F.2d 958, 963 (5th Cir. 1978); United States v. Spectro Foods, Corp., 544 F.2d 1175, 1182 (3rd Cir. 1976). In other words, under civil contempt, the contemnor carries the key to the prison, or the ticket to nullify any monetary fines, in his own pocket. Southern Ry. Co. v. Lanham, 403 F.2d 119, 125 (5th Cir. 1968).

The power to impose coercive imprisonment in a civil contempt proceeding, however, is limited by the individual's ability to comply with the Court's Order. Thus, when the Grand Jury

is discharged, confinement for civil contempt must terminate because the possibility of compliance has ended. Shillitani v. United States, supra, 384 U.S. 364, 371, 86 S.Ct. 1531, 1536; United States v. Petito, 671 F.2d 68, 72 (2nd Cir. 1982). Stated another way, a civil contempt proceeding abates when the proceeding out of which it arose has terminated. Backo v. Local 281, United Broth. of Carpenters and Joiners of America, 438 F.2d 176, 182 (2nd Cir. 1970), cert.den., 404 U.S. 858, 92 S.Ct. 110 (1971).

Such is precisely the situation in the case at bar. Due to the running of the Statute of Limitations, the Grand Jury investigation into the robbery of the U.S.S. Dixon is, for all practical purposes, over. There being no authorized proceeding, therefore, that

the Fergusons could now testify before the civil contempt must be set aside.

II

The Ninth Circuit Affirmance of the District Court's Refusal to Consider the Validity of its Civil Contempt Order, After the "Public Necessity" that Allowed the Original Grant of Immunity to Petitioners Was Negated by the Running of the Statute of Limitations, is in Conflict With the Holding of the Second Circuit in United States v. Handler, 476 F.2d 709 (2nd Cir. 1973).

Donald and Joseph Ferguson have presently been held in civil contempt, and ordered confined, because of their failure to provide testimony to a Grand Jury regarding a crime for which the Statute of Limitations has now run. Any further confinement of the Fergusons will violate the letter and the spirit of the

statutes which allow for the obtaining of use immunity (18 U.S.C. Section 6003) and for the incarceration of a recalcitrant witness who refuses to testify (28 U.S.C. Section 1826).

In this cause, the United States Attorney requested an Order from the Court requiring the Fergusons to "give testimony or provide other information which (they refuse) to give or provide on the basis of (their) privilege against self-incrimination..." pursuant to 18 U.S.C. Section 6003(a). Pursuant to 18 U.S.C. Section 6003(b):

"A United States Attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated assistant Attorney General, request an Order under subsection (a) of this section when in his judgment --

(1) The testimony or other information from such

individual may be necessary
to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." (Emphasis supplied.)

In this proceeding, the testimony of the Fergusons is no longer "necessary to the public interest" in that the Grand Jury can no longer indict anyone for the robbery of the U.S.S. Dixon. The District Court agreed that an application under 18 U.S.C. Section 6003 would not be approved by the Attorney General today because of the running of the Statute of Limitations. (R.T. 5; Proceedings of October 28, 1983). However, the Court did not feel this lack of "public interest" at this time would have any effect on its contempt Order, nor did the Court feel it had any obligation or ability to re-evaluate the viability or validity of the contempt Orders once the Statute of Limitations had run.

However, there is authority for the fact that the cessation of the "public necessity" that led to the grant of immunity extinguishes any contempt Order. In United States v. Handler, 476 F.2d 709 (2nd Cir. 1973) the Court noted:

"In ruling as we do, we emphasize at the same time the remedial nature of Handler's confinement. The importance of that fact is the recognition of Handler's continuing right to petition the District Court for release if it appears that he is no longer able to comply with the Order to testify or [if the public necessity that led to the grant of immunity and the Order to testify should cease to exist.] Id. at 715, fn. 7. (Emphasis supplied.)

In this cause, there is no longer any public necessity which led to the original grant of immunity, in that the Statute of Limitations has run and no

Indictment can be returned. Therefore, any further confinement would become punitive rather than civil in nature. Due to the lack of "public necessity" at this time, the civil contempt Orders should be set aside.

Pursuant to Title 28 U.S.C. Section 1826(a), a recalcitrant witness, who refuses to testify after having been granted immunity, may be ordered confined. However, "no period of such confinement shall exceed the life of -- (1) the Court proceeding, or (2) the term of the Grand Jury, including extensions..."

Although counsel for the Petitioners has found no controlling authority, it would appear to violate the spirit of 28 U.S.C. Section 1826(a) to confine an individual who has refused to testify when there can no longer be any

"court proceeding". The Statute of Limitations ran at midnight on October 26, 1983, with no Indictment having been returned. The Petitioners take the position that the "court proceeding" with regard to the robbery of the U.S.S. Dixon has terminated for the purpose of civil confinement in that it is impossible for an individual to ever testify at such a court proceeding in the future.

CONCLUSION

For the foregoing reasons, Petitioners Donald and Joseph Ferguson pray that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

Respectfully submitted,

Frank T. Vecchione

FRANK T. VECCHIONE
Attorney for Petitioners
DONALD FERGUSON
JOSEPH FERGUSON

PROOF OF SERVICE

I, BONNIE WHITEHALL, do hereby state:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action.

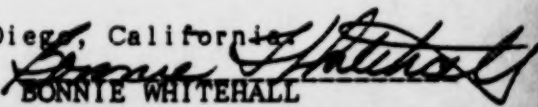
My business address is 108 Ivy Street, San Diego, California, 92101.

On March 9, 1984, I placed in an envelope, with postage prepaid, a copy of: PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT addressed to the following individual:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530
and thereafter placed same in the United States mail at San Diego, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 9th day of March, 1984, at San Diego, California.


BONNIE WHITEHALL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS,)
STUART A. LESTER, and DONALD)
FERGUSON,)

Witness/Appellants,)

v.)

UNITED STATES OF AMERICA,)

Appellee.)

-----)
IN RE GRAND JURY PROCEEDINGS,)
JOSEPH FERGUSON,)

Witness/Appellant,)

v.)

UNITED STATES OF AMERICA,)

Appellee.)
-----)

Nos. 83-6354, 6360

DC Nos. CR 83-96 MISC, CR 83-97 MISC

MEMORANDUM

Appeal from the United States
District Court for the Southern
District of California
Hon. Leland C. Nielsen, Presiding

Submitted November 28, 1983

Before: ANDERSON, TANG and SKOPIL,
Circuit Judges

The district court's orders of October 26, 1983, adjudging Appellants Donald and Joseph Ferguson in civil contempt are affirmed. The order holding Appellant Stuart Lester in contempt, however, is vacated and the cause remanded to district court.

The name of the client and the nature of the attorney's fee arrangements with the client are not normally confidential communications protected by the attorney-client privilege. See In re Michaelson, 511 F.2d 882, 889 (9th Cir. 1975). The identity of the client and the nature of the fee arrangements are privileged, however, when the person invoking the privilege can demonstrate a strong probability that disclosure would implicate the client in the very criminal activity for which advice was sought. See United States v. Hodge and Zweig, 548

F.2d 1347, 1353 (9th Cir. 1977); Baird v. Koerner, 279 F.2d., 630-32 (9th Cir. 1960). The attorney-client privilege is applicable in such a situation because disclosure would reveal information that is normally privileged, e.g., the client's motive in seeking legal advice. See Baird v. Koerner, 279 F.2d at 632; In re Grand Jury Proceedings (Jones), 517 F.2d 666, 672 (5th Cir. 1975).

Upon remand Lester can be required to disclose whether or not he represents the Fergusons. The fact that an individual sought legal advice, without more, is not incriminating. Moreover, if Lester does represent the Fergusons, he must divulge the nature of the fee arrangements he entered into with them.

Lester need not, however, reveal the name of the client who sought his advice in November 1978 concerning the robbery

of the U.S.S. Dixon. Disclosure of the client's name would implicate the client in the robbery and might provide "the link that could form the chain of testimony necessary to convict [the client] of a federal crime." Baird v. Koerner, 279 F.2d at 633. In addition, disclosure of the client's identity would reveal the client's motive for seeking legal advice. Id. at 632; Jones, 517 F.2d at 672.

Appeals nos. 83-6354 and 83-6360 are AFFIRMED.

Appeal no. 83-6353 is REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS,)
STUART A. LESTER, and DONALD)
FERGUSON,)
)

Witness/Appellants,)
)

v.)
)

UNITED STATES OF AMERICA,)
)

Appellee.)
)

IN RE GRAND JURY PROCEEDINGS,)
JOSEPH FERGUSON,)
)

Witness/Appellant,)
)

v.)
)

UNITED STATES OF AMERICA,)
)

Appellee.)
)

Nos. 83-6354, 6360

DC Nos. CR 83-96 MISC, CR 83-97 MISC

ORDER

Before: ANDERSON, TANG and SKOPIL,
Circuit Judges

Appellant's petition for rehearing
or rehearing en banc is denied.

1/23/84SP
(CR CAL 11/7/83)